STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2002
v	No. 232861 Kent Circuit Court
KEITH RAYMON WALKER, Defendant-Appellant.	LC No. 99-011347-FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced to lifetime probation. We affirm.

Defendant's conviction arises from a drug raid carried out at a Grand Rapids apartment on October 15, 1999. Defendant was found sitting on the arm of the living room couch. To his right on the couch was Robert Smith. A bag containing crack cocaine and heroin was found on the couch to the right of where Smith was sitting. Tracey Blakely was also in the living room. All three were ordered to lie on their stomachs, had their hands handcuffed behind them, and were patted down for weapons. No weapons were found on their persons. The police also found three other individuals in the kitchen, and one person, Tamara Walton, in the bedroom. Three bags of crack cocaine were found in Walton's handbag.

While two police officers were questioning Smith in the middle of the living room, the two officers saw a bag which was ultimately found to contain more than fifty rocks of crack cocaine come flying through the air. Officer Konynenbelt, one of two officers interrogating Smith, testified that he saw the bag come from the corner of the room where defendant was lying and land on the back of the couch. The other officer also believed the bag came from the area where defendant was located. While Konynenbelt did not see defendant throw the bag, he opined that defendant had pulled the bag from a back pocket and thrown it approximately eight feet across the room. The charges against defendant are related only to this bag of cocaine.

Of the seven people found in the apartment at the time of the raid, only defendant, Smith, and Blakely were in the living room at the time the bag was thrown. At the time, defendant was still lying face down on the floor with his hands handcuffed behind his back. Konynenbelt testified that immediately after the incident, he approached defendant and noticed that a lottery

ticket was now lying on his sweatpants, just above a back pocket. Konynenbelt speculated that the lottery ticket came out of defendant's pocket when he pulled out the bag of cocaine. Also found in the living room was a bag containing ten packets of heroin, a digital scale, and a loaded semiautomatic handgun, which was located behind the couch near where defendant was observed sitting by the police.

Walton, who at the time of trial was also facing charges of cocaine possession stemming from this event, testified for the prosecution. Walton testified that while she had not been offered a plea agreement in return for her testimony, she was hoping that the prosecutor would show leniency because of her cooperation. According to Walton, she let defendant and Smith use her apartment to sell drugs in exchange for crack cocaine. Walton testified that three or four days prior to the raid, the two men began selling crack cocaine and heroin from her apartment. According to Walton, Smith sold the crack and defendant sold the heroin. During Walton's testimony, the court sua sponte "remind[ed] the jury that [defendant] . . . is not charged with selling heroin. That is not the charge in this case."

At one point during Walton's testimony, the prosecutor inquired if Walton had ever seen defendant armed. Defendant objected, arguing that testimony about the handgun found at the scene should not be allowed given that a charge of felony-firearm[1] had been dismissed at the preliminary examination. The prosecution countered that the gun was relevant because "[d]rug dealers use guns, as Detective Konynenbelt testified."[2] The court overruled the objection, but before allowing the prosecutor to continue, the court told the jury that defendant was not facing a gun charge.[3] Walton testified that she did see defendant in possession of a gun during his time in her apartment.

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[1] MCL 750.224b.

[2] Konynenbelt had testified finding a handgun in the living room was significant because:

> Firearms and drugs quite frequently go together. Drugs—drug selling can be a very dangerous business. Other drug dealers want to rip other ones off, get their money, get their drugs, a lot of competition. You can eliminate competition. So there are drug dealers out there who will attempt to protect their business, their person or their business, their house, their apartment, by having a firearm.

The prosecutor first raised with Konynenbelt the issue of the handgun in conjunction with the digital scale. When Konynenbelt testified that he had not tagged for identification either piece of evidence, defendant objected. The prosecutor responded that he raised the issue not because he was moving to admit the two items into evidence, but because he wanted to ask the officer "if there is any significance to the finding of this digital scale and firearm at the scene." Defendant did not object to this line of inquiry.

[3] The court reminded the jury once more during the course of Walton's testimony that defendant was not being charged with respect to the gun. Further, during its charge to the jury, the court instructed as follows:

> You have heard evidence in the course of this case that was introduced to show that the defendant committed or was involved in some other improper acts

(continued…)

At the time of his arrest, defendant told the police he was just visiting from Detroit. He indicated that he did not know to whom the drugs belonged. Smith testified at trial that all of the drugs found in the living room were his and that defendant was in no way involved in the drug enterprise.[4] According to Smith, he had just asked defendant to travel with him from Detroit to Grand Rapids to meet some women. Smith also testified that the handgun was neither his nor defendant's.

Defendant raises a three-pronged due process challenge. Whether a defendant has been denied his right to due process is a question of law we review de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

First, defendant argues that his due process rights were violated when Walton testified that defendant was dealing heroin from the apartment. Defendant asserts that the trial court abused its discretion in admitting this other acts evidence. MRE 404(b). We disagree. When relevant, other acts evidence may be admissible when offered for a proper purpose. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). "The decision whether such evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Accord *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

Before trial, defendant moved to exclude Walton's testimony about defendant's involvement with heroin dealing. The prosecution countered that the evidence was admissible pursuant to *People v Delgado*, 404 Mich 76; 273 NW2d 395 (1978). The court denied defendant's motion, reasoning that the evidence was "part of the res gestae and the general scene." We agree.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), our Supreme Court set forth a four part test to be used when considering the admissibility of other acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

(…continued)

> for which he is not on trial. I have to tell you that the defendant is not on trial for any offense involving heroine. He is also not on trial for any offense pertaining to a firearm. The other evidence was introduced only to show that it was part of the entire scene at that time. You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of some other bad conduct. . . .

[4] Smith had earlier pled guilty to a charge of possession with the intent to deliver cocaine. Apparently a second charge involving the heroin was dismissed at Smith's plea hearing. As of trial in the case at bar, Smith had completed his sentence on his cocaine conviction.

The prosecutor cited *Delgado* as the rationale for Walton's testimony about heroin dealing. In *Delgado*, our Supreme Court observed, "'Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'" *Delgado, supra* at 83, quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964). While this rationale is not expressly articulated in the list of grounds set forth in MRE 404(b) for the admission of other acts evidence, the rule clearly states that the list is not exhaustive. Rather, the list is illustrative of the potential noncharacter theories of logical relevance under which other acts evidence may be admitted. We believe that offering other acts evidence as res gestae evidence satisfies the first prong of the *VanderVliet* test.

We also conclude that this evidence was relevant. See *People v Hawkins*, 245 Mich App 439, 449; 628 NW2d 105 (2001). Res gestae evidence is relevant when it:

> "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' (and is thus) part of the res gestae of the crime charged." [*United States v Masters*, 622 F2d 83, 86 (CA 4, 1980) (footnotes and citations omitted).]

The prosecution's theory of the case was that defendant and Smith were involved in a joint enterprise to sell drugs out of Blakely's apartment. Walton's testimony was logically relevant to show that defendant was part of this joint enterprise. Indeed, defendant's alleged handling of the heroin arm of this illicit enterprise is so "intimately connected" with the crime charged, that we believe it is essential "to complete the story of the crime on trial by proving its immediate context." This evidence is also relevant because it tends to negate defendant's assertion that he was, in effect, an innocent bystander.

We believe that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was highly probative on both the actus reus and mens rea of the crime charged. We also note that the trial court carefully instructed the jury on the limits of this evidence both during Walton's testimony and during its charge at the close of proofs. See *supra* n 2 and accompanying text. Under these circumstances, we conclude that the trial court did not abuse its discretion in permitting this testimony. See *United States v Bloom*, 538 F2d 704, 707 (CA 5, 1976) (where defendant was charged with selling heroin to an undercover agent, testimony about discussions involving the sale of marijuana and cocaine held to be admissible because it "served merely to complete the [undercover] agents' accounts of their dealings with" the defendant); *United States v Bailey*, 451 F2d 181, 183 (CA 3, 1971) (in a case involving the sale of narcotics, testimony concerning a fraudulent sale of cocaine "was admissible as part of the res gestae").

Second, defendant argues that his due process rights were violated when the court allowed testimony concerning the handgun recovered at Blakely's apartment. Again, we disagree. While not indicative of criminality by themselves, guns are universally recognized as

being tools of the drug trafficking trade. See, e.g., *US v Marino*, 658 F2d 1120, 1123 (CA 6, 1981). As *Marino* observed, "Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment." *Id.* Accordingly, we conclude that evidence that a handgun was found in the room where defendant and Smith were found is relevant. *Id.* (concluding that evidence of weapons found during a search of the defendant's suitcase was relevant and admissible even though the defendant was not charged with a firearm offense); accord *United States v Hatfield*, 815 F2d 1068, 1072 (CA 6, 1987) (observing that "weapons have been introduced in drug offense cases to establish the intent to distribute drugs"). Further, given the trial court's repeated reminders to the jury that defendant was not charged with a firearm offense, as well as the court's clear limiting instructions, we conclude that admission of this evidence is not precluded by MRE 403.

Finally, defendant argues that he was denied a fair trial by prosecutorial misconduct during closing arguments. "We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *Watson, supra* at 586. Specifically, defendant asserts that the prosecutor improperly vouched for a police witness, improperly denigrated Smith, and improperly asked the jury to step into defendant's shoes. We find no merit in any of these claims.

Defendant contends that the prosecutor improperly vouched for Konynenbelt's credibility. During closing argument, the prosecutor stated:

> Now, we've got drugs throughout this house. We've got the drugs, the cocaine and the heroine, [sic] found next to Mr. Smith, and we have this incident of the flying baggie of crack cocaine. I would submit to you that Detective Konynenbelt testified truthfully. If he wanted to lie, if he really wanted to pile it on, he would say, "yeah, I really, I saw him throw the baggie." Unfortunately, we don't have that for you. But I submit to you he's being honest as he can. You judge the demeanor of the witness, Ladies and Gentlemen, and I submit that when you do that, you'll be able to determine whom you're going to believe or not believe.

Because defendant failed to object to these remarks, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice . . . ." *Id.* Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

We do not believe that these comments constituted improper vouching. The prosecutor did not insinuate that he had some special knowledge unknown to the jury that the officer had testified truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Further, we

do believe that a prompt, curative instruction could have eliminated any possible prejudice resulting from the remark. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Additionally, the trial court instructed the jurors that it was their duty to assess credibility and that "the lawyers' statements and arguments are not evidence" to be considered when reaching a verdict. *People v Knapp*, 244 Mich App 361, 382-383; 624 NW2d 227 (2001). Under these circumstances, we conclude that reversal is unwarranted.

Defendant also claims the prosecutor improperly maligned Smith during his closing argument. Specifically, defendant cites the following comments:

> I would submit to you that Mr. Smith's testimony is on its face incredible. It's not believable. Did he appear to be a believable witness? I'm not just saying that because [defense counsel] . . . called him.

Defendant also cites other comments, contending that they continued the denigration of Smith and suggested that the prosecutor had some special knowledge why Smith had not earlier come forward with testimony that exonerated defendant:

> Silence, nothing, zero. He doesn't write us, he doesn't call us. He doesn't attempt to call the police, zero. His good friend, he attempts to bail him out, when? When the clock is ticking. It's the eleventh hour, and its about to strike midnight. Magically he walks in here, doesn't have a great memory of the events, but tells you, "My friend over here is innocent. He was just going along so he could get some girls for us."

Defendant did not raise below an objection to either of these challenged remarks.

Contrary to defendant's assertion, we fail to see any insinuation in these comments that the prosecutor had some special knowledge why it took so long for Smith to come forward. We also reject the assertion that the above cited remarks evidence a prosecutor improperly maligning a witness. Noticeably missing from defendant's argument are the following remarks, which fell between the above two excerpted segments of the prosecutor's closing argument:

> Did he appear to be telling the truth? He waits 14 months, 14 months after he did all his time on the crime, so he can't be had again, and he walks in here free as a bird and takes the rap for his buddy. Is that believable? Is that reasonable? Isn't it reasonable that a person who is a friend would maybe not right off the bat, maybe not when Detective Rozema interviewed him, maybe, maybe, I don't want to submit it right now, but after, at least, Ladies and Gentlemen, at least when he's up before Judge Soet and he's pleading guilty, don't you think a believable, reasonable person would say, "By the way, you got the wrong guy here on the other guy, Mr. Walker is innocent." This may be hard to believe, but this is what really happened.

It is clear from the context that the prosecutor was arguing from the facts that Smith was not worthy of belief. This is a proper mode of argument. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Accordingly, defendant has failed to establish plain error affecting substantial rights. *Carines*, *supra*.

Finally, defendant challenges the propriety of the following comments made by the prosecutor in his rebuttal closing:

> But what did he do here? He waived his rights. He talked a little bit. Why is that important? Ladies and Gentlemen, common sense. Does an innocent person sit there and say, "Well, I don't want to say anything about the drugs." They're all around him, they're next to him, they're flying through the ceiling—or the air, you got a gun in the house, on this weekend excursion. But he doesn't say anything. What would all of you folks do? What would a reasonable person do?

Defendant did object to these comments, arguing that it was improper for defense counsel to ask the jurors to step into defendant's shoes. The objection was overruled.

Again, it is essential to consider the above excerpted remarks in context. In his closing, defendant argued that the prosecution's theory of the case was "unbelievable," and that the police had come forth with a "cockamamie story" about a flying bag of cocaine. Defendant argued that the prosecution's case was a woven web of deception[5] that collapsed under the weight of numerous inconsistencies. Recalling Smith's testimony, defendant asserted that he was not involved in drug dealing, but was, in essence, in the wrong place at the wrong time, i.e., that he had simply driven Smith to Grand Rapids and had no knowledge of what Smith was doing:

In his rebuttal closing, the prosecutor addressed this final assertion in this manner:

> "He's innocent, he was just here." But you know something, the Judge is going to tell you this, when you're arrested, the police have to read you your rights if your taken into custody. When they do that, you have a right to remain silent, okay? And if you decide, "I don't want to talk, period, I want a lawyer," they can't say boo about it, boo. I can't call him to the stand, and I can't say, "What did you say?" I asked him, he said, " I want an attorney." Those words, immediate mistrial, can't hear them. We cannot bring that out, big no-no. Judge will come down on me like a ton of bricks in the new courthouse, okay?
>
> But what did he do here? He waived his rights. He talked a little bit. Why is that important? Ladies and Gentlemen, common sense. Does an innocent person sit there and say, "Well, I don't want to say anything about the drugs." They're all around him, they're next to him, they're flying through the ceiling—or the air, you got a gun in the house, on this weekend excursion. But he doesn't say anything. What would all of you folks do? What would a reasonable person do?

We believe these comments clearly came in response to defendant's argument that he was an innocent bystander caught up in a web of deceit woven by the police and the prosecution.

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[5] The theme defendant used to link together the elements of his closing argument was set forth in defense counsel's paraphrase of the oft-heard quote from Sir Walter Scott, "Oh what a tangled web we weave, When first we practice to deceive!" Sir Walter Scott, *Marmion*, canto vi, stanza 17.

People v Duncan, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, the prosecutor made clear when counsel objected that he was not asking the jurors to place themselves in defendant's shoes, but instead to consider what a reasonable person would do in the situation.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh